## ODHERMAL v. TAN CHENG LOCK & ESTATE & TRUST AGENCIES (1927) LTD., & ANOR.

[C. A. (Sir Charles Murray-Aynsley, C.J., Mathew, C.J. (F.M.) and Brown, J.) January 8, 1953]

[Singapore — Civil Appeal No. 19 of 1952]

*Landlord and tenant — Whether occupier is sub-tenant or licensee — No lease or tenancy without exclusive possession.*

The main issue in this action was whether the appellant-defendant was a sub-tenant or licensee of part of the premises of which the 1st respondent-plaintiff is the owner and the 2nd respondent-plaintiff was the lessee. An agreement for the use of this part of the premises had been entered into between a previous chief tenant and another person from whom the appellant-defendant had derived his interest. The agreement did not state whether there was sub-letting or a licence. Subsequently the 2nd respondent-plaintiff had taken over the lease of the whole premises with the subsisting interest of the appellant-defendant from whom the 2nd respondent-plaintiff now claims possession.

The question for decision was whether the appellant-defendant was a licensee or a sub-tenant. The learned trial Judge considered that this turned on whether the original chief-tenant had abandoned control of that part of the premises used by him and if so whether the sub-tenant and the appellant-defendant deriving interest from the sub-tenant had exclusive possession of the premises.

The agreement contained a clause on restraining the tenant from placing "any article or goods on the top of his show cases higher that 9 inches. The trial Judge held that the possession by the 2nd respondent-plaintiff of the keys of the premises and the restrictive clause against interference with the interests of other persons doing business in the same premises did not indicate the fact that the appellant had exclusive possession. Judgment for possession was accordingly entered against the appellant-defendant.

In allowing the appeal the Court of Appeal held that the appellant-defendant was a tenant and not a licensee.

*Cases referred to :—*

(1) *Clore v. Theatrical Properties Ltd. & Westby & Co.* (1936) 3 All E.R. 483.

(2) *Shaw v. Habibulah* (1950) M.L.J. 111; (1950) M.L.R. 60.

(3) *Taylor v. Caldwell* (1863), 122 E.R. 309.

**Knight, J. :** — In this action the first plaintiff, which is a limited liability Company owning certain premises situated at No. 6 Raffles Place Singapore, claims a declaration that the defendant, who is an Indian shopkeeper, has no right to use part of these premises for the purpose of his business whilst the second plaintiff (who is also a shopkeeper), as lessee of the first plaintiff, seeks possession of the premises themselves.

The history of the matter, on which I must touch briefly is as follows.

In April 1948 one Lim Sok Kiong who was then the chief tenant of the whole of the ground floor of No. 6 Raffles Place entered into an agreement with a Mr. T. B. Aswani whereby the latter obtained the use of approximately one quarter of the ground floor space as a place for him to sell his merchandise. This agreement was not drawn up by anyone with legal qualifications and, *inter alia,* speaks about a "sub-tenancy" and a "sub-tenant" though, clearly, neither party either then or subsequently knew or cared whether they were creating a lease or a licence. On December 12th 1948 these same parties entered into another agreement in respect of the same piece of floor space whereby their rights and responsibilities were more clearly defined. Once more, this agreement was not drawn up by a lawyer and the words "tenant", "sub-tenant", "sub-letting" and "underletting" appear frequently in its text. By clause 2(2) of the latter agreement Mr. T. B. Aswani was permitted to assign his interest in the premises without Mr. Lim's consent and on 4th August 1949 Mr. Aswani did in fact assign his interest to Mr. C. Odhernal who is the defendant in these proceedings. By a deed of release dated 28th September 1951, Lim Sok Kiong surrendered his interest as chief tenant of these premises and on 2nd October 1951 the first plaintiff entered into a lease with the second plaintiff whereby the former demised the premises to the latter for a period of three years from that date. Save that there is a counterclaim against the first plaintiff for the return of $750 which sum is said to have been paid by the defendant to him in error by way of rent, this Company does not really enter into the proceedings and no evidence was called on its behalf.

With the agreement of both Counsel it was decided at the beginning of the hearing that the only issue before the Court was whether the defendant was a licensee or a sub-tenant and it was similarly agreed that all other considerations arising in the pleadings should be waived. This, then, is the only point for determination and I shall not deal with other matters raised specifically or by application in the pleadings.

Now before considering this matter I think it right to endeavour to describe the premises in question as this is not without relevance. The ground floor of No. 6 Raffles Place, from the photographs and the plan which have been exhibited, is a long, narrow room the front part of which overlooks the pavement of Raffles Place from which access is gained to the shop by three doors. As one enters, on the right there are certain tall show cases and cupboards against the wall, thereafter a two foot passage and then some lower glass show cases. This part of the premises, which extend to a distance of only 6 feet from the right hand wall and 33 feet in length is that used by the defendant and is the subject matter of this action, though it is agreed in addition that he and his customers have the use (1) of a communal passage (which runs down the centre

of the ground floor) and (2) of a fitting room on the left hand side as one enters from the street. The whole of the rest of the ground floor is used by the second plaintiff. The premises are thus divided as to three quarters which is used by the second plaintiff to display and sell his wares whilst the remaining quarter is used by the defendant for a like purpose.

For the defendant it is argued that Aswani was a sub-tenant of Lim; that defendant is in the same position as Aswani and that the second plaintiff, knowing full well of the presence of the "sitting tenant" when he was granted his lease on 2nd October 1951 can be in no better position than Lim was — in short that the defendant is his (the second plaintiff's) sub-tenant. If this is correct, and apart from whatever protection the defendant may be afforded by the Control of Rent Ordinance it is clear that he has a defence to this action as it is admitted that the second plaintiff has never given him notice to quit. For the second plaintiff Counsel maintains that the agreement between Lim and Aswani was a mere licence and that when the licensor's interest ceased i.e. on September 28th 1951 when Lim surrendered his interest in the premises, his licensee's interest similarly ceased and that with effect from this date the defendant's position on the premises was that of a mere trespasser.

A vast quantity of authorities have been quoted by Counsel on each side with which I do not propose to deal at length. It is an elementary proposition that a lease conveys a right of exclusive possession and that an instrument does not become a lease merely because it contains the usual words found in a demise — provided always that such was not the intention of the parties. The latter proposition need not be stressed as the text of the indenture in *Clore v. Theatrical Properties Ltd. and Westby & Co.*[1], as in this case, contained many words used usually in leases — yet the instrument was held to be a licence. It follows thus, as I see it, that unless the parties intended to set up the relationship of tenant and sub-tenant and unless the latter in fact obtained exclusive possession of his part of the premises he is no more than a licensee.

Not unnaturally Counsel have been unable to trace any reported English case covering the exact set of circumstances here. Save in such cities as Singapore where the fashionable shopping district is very small it is unlikely that any shopkeeper would allow another shopkeeper to use part of his premises. There is however, a decision of this Court which comes very close to the present case — *Shaw v. Habibulah*[2] where various people used parts of the same premises and where, as here, the parties gave no thought as to whether there was a sub-letting or a licence — I say that in this case as although there are many words in these agreements which one might expect to find in a lease, there are many others far more consistent with a licence. Relying on *Taylor v. Caldwell*[3] Thorogood, J., in *Shaw's case* held that without exclusive possession there could be no lease and I have no doubt that his decision on this point is a correct one.

In short this case really turns upon whether Lim Sok Kiong in his agreement with Aswani had abandoned control of that part of the premises used by him and, if so, whether Aswani, and subsequently the defendant, had exclusive possession of it.

Now it is not disputed that the keys of the premises were always in possession of the 2nd plaintiff (or his predecessor) and that the defendant has never had access to them. Again it appears to have rested on the decision of the 2nd plaintiff as to whether or not the shop — necessarily including that part of it used by the defendant — should open on public holidays. Not insignificantly moreover, as 2nd plaintiff is a Chinese, we have been told that over Chinese New Year the shop remained closed — though it stayed open for business during Indian holidays which one might have expected the defendant, who is an Indian, to celebrate by remaining away from work. Next it is admitted that the 2nd plaintiff or his agent invariably locked up the premises at night and reopened them in the morning. Should the defendant wish to enter the premises by night, as he had occasion to do at times, the 2nd plaintiff sent out his servants to open them and once more locked up when the defendant had accomplished the object of his visit. These considerations certainly do not indicate the fact of defendant's exclusive possession but in addition to these he was also bound by Aswani's agreement with Lim "not to place any article or goods on the top of his show cases higher than 9 inches". If possession were exclusively that of the defendant can it seriously be argued that this clause would have crept into the agreement? Surely its presence can only indicate that Lim far from abandoning control of Aswani's part of the premises was taking every step to ensure that his use of them should not interfere with the interests of the other persons doing business in the same premises.

In my judgment and despite the wording of the agreements in this case and the authorities to which I have been referred the defendant (and his predecessor) at no time had exclusive possession and is thus, a licensee and not a tenant. This must dispose of the case as although the 2nd plaintiff took his lease with knowledge of the presence on the premises of "the sitting tenant" he thought at that time, and rightly as it has transpired, that he could take steps to have him removed. The *Strathcona* case has thus no application.

I hold therefore that with effect from the date of the deed of release the defendant in this case has been a trespasser and that the 1st plaintiff is entitled to the declaration claimed in the Statement of Claim. The 2nd plaintiff will be awarded the following reliefs :—

(1) Possession.

(2) The declaration he seeks in the Statement of Claim and

(3) Damages less the sum of $750 which the defendant has paid to 1st plaintiff and should be recovered by 2nd plaintiff from the Company.

I shall hear argument as to damages and costs.

**From the above judgment the defendant appealed.**

COURT OF APPEAL.

*K. A. Seth* (*H. A. Francis* with him) for the appellant-defendant cited: *Megarry* 6th Edn. p. 36; cases where there was no written document: *Booker v. Plamer* (1942) 2 All E.R. 674 at 676, *Errington v. Errington* (1952) 1 All E.R. 149, *Cobb v. Lane* (1952) 1 All E.R. 1199, *Shaw v. Habibulah* (1951) M.L.J. 60; cases where there was a written document: *Selby v. Greaves* L.R. (1867) 3 C.P. 594, *Joel v. International Circus* 124 L.T. 459, *Three D's Co. v. Burrow* (unreported) see 99 L.J. 239-240 and article at p. 564, *Facchini v. Bryson* (1952) 1 T.L.R 1386, and article in 102 L.J. 437.

*J. E. Lloyd* for the respondents-plaintiffs cited: *Clore v. Theatrical Properties Ltd.* (1936) 3 All E.R. 483, *Frank Ware v. L. C. C.* (1904) 1 K.B. 713, *Helman v. Horsham Assessment Committee* (1949) 1 All E.R. 776, *Jackson v. Simons* (1923) 1 Ch. 373, *Taylor v. Caldwell* 122 E.R. 309, and *Rendell v. Roman* 59 L.T.R. 192.

The judgment of the Court of Appeal was delivered by :—

**Sir Charles Murray-Aynsley, C.J.** : — There does not appear to be any necessity to add much to the oral judgment given at the hearing. The case was a claim for possession. The whole matter depended on whether the defendant-appellant was a tenant or licensee. In view of the evidence and the documents we came to the conclusion that he was a tenant. The appeal was, therefore, allowed with costs here and below except on the counterclaim, and judgment entered for the defendant-appellant.

*Appeal allowed.*

## COMPTROLLER OF INCOME TAX v. X., CO.

[A. C. J. (Wilson, J.) February 11, 1953]

[K.L. — Selangor Civil Appeal No. 17 of 1952]

*Income Tax Ordinance, 1947, s. 39 — Discretion of Comptroller — Whether dividends paid in 1950 were paid out of chargeable income for 1951.*

The respondents applied to the Comptroller of Income Tax under section 39 of the Income Tax Ordinance for an amendment to the 1951 assessment on the ground that dividends paid by them in 1950 were paid out of the chargeable income for 1951 and that the rate of tax was higher in 1951 than in 1950. The Comptroller refused the request and the respondents appealed to the Board of Review which allowed the appeal. The Comptroller appealed to the High Court alleging that he had an absolute discretion under the proviso to section 39 not to grant any reduction, and that in any case the dividends were not paid out of the chargeable income for 1951.

**Held:** the Comptroller has not an absolute discretion, and that the dividends paid in 1950 were paid out of the chargeable income for 1951.

*Case referred to :—*

(1) *Julius v. Oxford (Lord Bp.)* (1880), 5 App. Cas. 214.

CIVIL APPEAL.

*T. V. A. Brodie* (Solicitor-General) for the appellant.

*F. J. Woodward* for the respondents.

*Cur. Adv. Vult.*

**Wilson, J.** : — The respondent Company applied to the Comptroller of Income Tax under section 39 of the Income Tax Ordinance for an amendment to the 1951 assessment on the grounds that the dividends paid by the Company in 1950 were paid out of the Company's chargeable income for 1951. The Comptroller refused this request because he stated, he was not satisfied that the dividends paid by the Company in 1950 were paid out of the Company's chargeable income for 1951. The respondent Company thereupon appealed to the Income Tax Board of Review.

The facts and correspondence were agreed and are attached to the grounds of judgment of the Committee of the Board. A preliminary point was taken by the Comptroller of Income Tax that section 39 of the Ordinance confers a discretion on the Comptroller and that there is no provision in that section for an appeal to the Board. The same preliminary point was taken before this Court.

The material words of section 39 are as follows :—

"There shall be levied and paid for each year of assessment upon the chargeable income of every company, tax at the rate of thirty per centum on every dollar of the chargeable income tax thereof.

"Provided that where any company proves to the satisfaction of the Comptroller that any dividends have been paid out of such chargeable income,.....an